No. 18,535

In the

United States Court of Appeals

For the Ninth Circuit

ANTOINETTE BORNHOLDT, et al., *Appellants,* vs. SOUTHERN PACIFIC COMPANY, a corporation, et al., *Appellees.*	

Brief for Appellee Southern Pacific Company

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Brief for Appellee
Southern Pacific Company

SUPPLEMENTAL STATEMENT OF THE CASE

The Statement of the Case on pages 2 to 7, inclusive, in appellants' opening brief is supplemented and clarified as follows:

The deed dated August 6, 1890 (Ex. C), under which appellee acquired title to the depot grounds at Walnut Creek in Contra Costa County, California, was delivered to Southern Pacific Railroad Company (appellee's predecessor in interest) pursuant to the terms of a written instrument dated August 31, 1890 (Ex. B). The owners of certain land in Contra Costa County (including the grantors in the August 6, 1890 deed) deposited executed deeds, conveying necessary rights of way and depot grounds in

and through lands owned by them, with the Bank of Martinez at Martinez, California, for delivery to Southern Pacific Railroad Company, upon condition that construction of the San Ramon Branch Railroad be completed on or before July 1, 1891 (Ex. B). The construction of the San Ramon Branch Railroad was completed in June 1891 and the depot was constructed at Walnut Creek shortly thereafter. The railroad line and depot at Walnut Creek have been maintained and operated continuously up to the date of the First Amended Complaint herein (Ex. Z).

By lease dated September 23, 1952 (herein referred to as the Capwell lease), appellee leased to Capwell store's assignor the major portion of Parcel One described in the First Amended Complaint herein (Ex. A-A). The area of the property described in the Capwell lease is less than the area of Parcel One (Ex. W).

There is no public street reaching Parcel One (R.T. 45-47). The proximity of Parcel One to existing railroad tracks makes feasible the installation of a spur track thereon to provide rail service for Capwell store purposes (R.T. 107-08).

The evidence shows the depot constructed on the land conveyed by the August 6, 1890 deed has been maintained and used to handle a substantial volume of railroad business (Exs. A-Q and A-R), and that the depot grounds (which includes the property described in the First Amended Complaint herein) are required for future railroad operating needs in connection with the proposed upgrading of the San Ramon Branch to a by-pass main line and the installation of facilities for purposes of the expanding container and piggyback rail-truck service (R.T. 68-73; see Ex. 5). Appellee has entered into numerous leases covering portions of the depot grounds at Walnut Creek for railroad and other purposes (Exs. A-D through A-N) dur-

ing the period from 1891 to the date of the complaint filed in this matter without claim made by grantors, or those claiming under the grantors, of any breach on the part of appellee of the provisions contained in the August 6, 1890 deed.

REPLY TO APPELLANTS' SPECIFICATION OF ERRORS

The trial court did not err in its finding V, referred to in item 1 on page 7 of appellants' opening brief, that the reversionary clause in the August 6, 1890 deed was intended by the grantors for the benefit of their lands adjoining the property described therein and their ownership interest therein. The deed was delivered to the railroad company pursuant to the instrument dated August 31, 1890 (Ex. B) in which the grantors agreed to convey to Southern Pacific Railroad Company the necessary right of way and depot grounds for the San Ramon Branch Railroad in and through land in Contra Costa County, California, owned by them, upon completion of the construction, on or before July 1, 1891, of a continuous railroad track from Martinez to San Ramon. The construction of the railroad line through Walnut Creek was completed and the operation of such railroad line was commenced on or about June 7, 1891 (Ex. Z). In such circumstances, it may be reasonably inferred the August 6, 1890 deed was delivered to Southern Pacific Railroad Company in consideration of the benefit to the grantors' adjoining property and their interest therein by reason of the construction and operation of the San Ramon Branch Railroad. Inferences are evidence.[1] If different reasonable

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1. Indirect evidence is of two kinds:
   1 Inferences and
   2 Presumptions
   Cal. Cod. Civ. Proc. § 1957; *Scott v. Burke,* 39 Cal. 2d 388 247 P.2d 313 (1952).

inferences can be fairly drawn from the evidence, the reviewing court cannot disturb District Court's findings based on such inferences unless they are clearly erroneous. *James v. United States*, 252 F.2d 687 (1958). The inferences drawn by the trial court, unless clearly erroneous, are controlling on review. *Rich v. Pappas*, 229 F.2d 308 (1956). It is respectfully submitted such evidence is sufficient to support the above finding of the trial court.

The trial court did not err in the findings VI and XII, referred to in items 2 and 4 on pages 7 and 8 of appellants' opening brief, that Parcel One described in the First Amended Complaint herein has been used and held available by appellee and its predecessors in interest for such railroad purposes as may have been needed and required at all times concerned herein, that they never ceased to occupy the same for railroad purposes, and that the use of Parcel One for a parking lot did not violate nor constitute a breach of provision of the August 6, 1890 deed. The railroad line through Walnut Creek was constructed in 1891 and the Walnut Creek depot was constructed shortly thereafter. They have been maintained and operated continuously up to the date of the First Amended Complaint herein. The land described in the August 6, 1890 deed has been used or kept available to the extent required for railroad purposes by appellee and its predecessors in interest (Ex. Z). The summary of the shipments handled at Walnut Creek depot from 1955 through 1961 (Exs. A-Q and A-R) discloses a substantial volume of railroad business is transacted at such depot, including less-than-carload shipments received for subsequent delivery by appellee's truck service to the Capwell store at Walnut Creek. Capwell's have considered installation of a railroad spur track

upon a portion of Parcel One for receipt of carload shipments of merchandise (R.T. 107-08). Appellee has leased portions of the depot grounds at all times since the acquisition thereof for railroad and other purposes, subject to keeping such property available for the requirements of its service to the public (Exs. A-A through A-N), without claim made prior to the complaint herein by the grantors in the August 6, 1890 deed, or by those claiming under such grantors, of any breach of the deed provisions. Future railroad use for which the depot grounds at Walnut Creek are held by appellee includes installation of rail facilities in connection with the upgrading of the San Ramon Branch to a by-pass main line and the installation of satellite terminal facilities for appellee's expanding piggyback and container operations (R.T. 64-94, see Ex. 5). It is submitted such evidence is sufficient to support the above findings of the trial court.

The trial court did not err in finding IX that the Capwell lease was made expressly subject to termination at any time by appellee or the Public Utilities Commission of the State of California in the event use of the leased premises should become necessary or desirable in order for appellee or its predecessor to serve the public or its patrons.

Section 25 of the Capwell lease (Ex. A-A) reads as follows:

> "Lessee shall and hereby agrees to observe and comply with all federal, state, county and municipal laws now in effect or hereafter enacted with respect to the occupancy of said leased premises, in default of which Railroad may at its option forthwith terminate this lease and reenter upon the said leased premises and remove all persons therefrom."

Even in the absence of such express lease provision, the lease is subject to California law.[2] The laws of a state become a part of a contract and are as obligatory upon all courts as if they were referred to or incorporated in the terms of the contract. *Brown v. Ferndon*, 5 Cal. 2d 226, 231, 54 P.2d 712, 714 (1936).

Section 851 of the Public Utilities Code of the State of California, prior to its amendment in 1959, provided that no public utility shall lease its property necessary or useful in the performance of its duty to the public without first having secured from the Commission an order authorizing it to do so. Every lease made other than in accordance with the order of the Commission authorizing it is void. Section 851 further provides that nothing in the section shall prevent the lease by any public utility of property which is not necessary or useful in the performance of its duties to the public and the disposition of property by a public utility shall be conclusive and be presumed to be of property which is not useful or necessary in the performance of its duty to the public as to any lessee dealing with such property in good faith for value.

Appellants cite on page 15 of their opening brief several decisions of the California Railroad Commission (now the Public Utilities Commission) in which it was determined the particular property involved was not necessary in the performance of the duties of the public utility to the public. In other cases, the Public Utilities Commission has assumed jurisdiction over property of a public utility determined to be necessary or useful in the performance of its

2. *Traders & General Insurance Co. v. Pacific Employers Insurance Co.*, 130 Cal. App. 2d 158, 278 P.2d 493 (1955); *Ballerina v. Schlage Lock Co.*, 100 Cal. App. 2d 859, 226 P.2d 771 (1950); *American National Bank & Trust Co. v. U.S. Fidelity & Guaranty Co.*, 7 F. Supp. 578, 582 (1934).

duties to the public. In authorizing a transfer of utility properties to an entity not subject to regulation under the Public Utilities Act, the Commission has jurisdiction to impose such conditions, as, in its judgment, will protect and safeguard existing rights of those entitled to service. *East Side Canal & Irrigation Co. and Stevenson Water Dist.,* 41 C.R.C. 789 (1939). In the matter of *Princeton-Cadora-Glenn Irrigation District,* 13 C.R.C. 484 (1917), an application was made by the District to sell its property to purchasers unknown at an undetermined selling price. The Commission determined the property was operating property and granted the application, subject to subsequent Commission approval of the consideration and terms of each transaction by supplemental order. In all of the above cases, the Public Utilities Commission determined whether particular public utility property is operating or non-operating in character and, if determined to be operating property, it prescribed the conditions upon which a transfer or lease thereof could be made.

In order to avoid the necessity of obtaining the approval of the Public Utilities Commission for all uses made of portions of operating property of a public utility, the Commission issued General Order No. 69, granting blanket authority to public utilities to grant easements, licenses and permits; "provided, however, that each such grant shall be made conditional upon the right of grantor, either upon order of this Commissioner upon its own motion to commence or resume the use of the property in question whenever, in the interest of service to its patrons or consumers, it shall appear necessary or desirable to do so." The appellants contend the Capwell lease does not fall within the category of an easement, license or permit authorized under General Order No. 69. It is surprising

appellants take such position. If such contention is correct, the Capwell lease was issued without a Commission order approving it and it is therefore void, which disposes of the case at hand so far as appellants are concerned, inasmuch as on page 13 of their opening brief, appellants describe as an essential question to be answered in this matter whether or not the Capwell lease is valid for its original five-year term.

An examination of the Capwell lease discloses under section 1 thereof it is made for the sole purpose of automobile parking. Under section 14, the lessee is prohibited from constructing structures of any character on the premises without the written consent of appellee. It thus appears the permission granted under the Capwell lease to use the premises for automobile parking is in the nature of a license or a permit within the contemplation of the authority granted by the Public Utilities Commission under its General Order No. 69. A license or permit granted by a written instrument may remain in effect for such term as may be agreed upon by the parties and as specified in the written instrument. A license coupled with an interest is not revocable at will but continues to exist for the period contemplated by the license (31 Cal. Jur. 2d 221).

Appellants allege, on page 16 of their opening brief, the property in question is not operating property. The evidence in this case, however, clearly shows such property is an integral part of the depot grounds at Walnut Creek and is properly classified as operating property. A substantial volume of business is handled at the Walnut Creek depot (Exs. A-Q and A-R). Portions of the depot grounds have been leased for railroad and other purposes at all times, subject to keeping the property available for railroad operating requirements (Exs. A-A through A-N). The

testimony of appellee's witness John N. Cetinich (R.T. 64 through 94) shows the depot grounds at Walnut Creek, including the portion thereof leased to Capwell, are properly classified and held by appellee as operating property. He testified at length concerning the need for such property in connection with the proposed upgrading of the San Ramon Branch to a by-pass main line and the installation of additional terminals for appellee's expanding piggyback and container operations (R.T. 67-90).

Where, as in this case, property is acquired for railroad purposes and such public use has intervened by reason of construction of railroad facilities, the court cannot divest the public utility of title to the property required for such public purposes without the prior consent of the Public Utilities Commission. *Hosford v. Henry,* 107 Cal. App. 2d 765, 238 P.2d 91 (1951). The purpose of section 851 of the Public Utilities Code is to prevent (once acquired) the disposition of such property without prior consent of the Public Utilities Commission. If the courts can take action (without the prior consent of the Public Utilities Commission) which has the effect of taking away the property or any part thereof, then a party would be able to bring about indirectly through court action what cannot be done directly without the prior consent of the Public Utilities Commission. Such disposition of public utility property is prohibited by section 851 of the Public Utilities Code. *Hosford v. Henry, supra.*

In *Slater v. Shell Oil Co.,* 39 Cal. App. 2d 535, 547, 103 P.2d 1043, 1050 (1940), the court, in referring to section 851 of the Public Utilities Code, states in part:

> "The section means what it plainly states, that a purported transfer in violation of the statute confers no rights on the transferee."

It is submitted the above evidence clearly shows the property described in the Capwell lease is necessary for the performance of railroad service, subject to the jurisdiction of the Public Utilities Commission under section 851 of the Public Utilities Code, and the permission granted for parking purposes on Parcel One was subject to termination as provided in General Order No. 69 in accordance with the finding of the trial court referred to in this subsection.

The trial court did not err with respect to the conclusions of law referred to as items 5 to 8, inclusive, on page 8 of appellants' opening brief. The reasons why the court did not err are hereinafter set forth in appellee's argument in this brief.

ARGUMENT

For convenience of the court, the arguments in this reply brief will be addressed to the arguments made by the appellants in the same order as they appear in their opening brief, following which additional arguments of appellee will be set forth.

I. Appellee Has Not Ceased to Occupy the Premises in Question for Railroad Purposes.

A. THE CAPWELL LEASE WAS SUBJECT TO TERMINATION DURING THE INITIAL FIVE-YEAR TERM THEREOF BY APPELLEE OR BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA IN THE EVENT USE OF THE PROPERTY WAS REQUIRED FOR SERVICE TO THE PATRONS OF APPELLEE AND THEREAFTER UPON THIRTY DAYS' NOTICE BY APPELLEE FOR ANY REASON WHATSOEVER.

Appellants, at page 11 of the opening brief, cite the case of *Lundgren v. Freeman*, 307 F.2d 104 (1962), as standing for the proposition the interpretation of a lease is a legal matter in which the court is not bound by the interpretation placed upon the Capwell lease by the trial court. However,

the actual holding in the *Lundgren* case is that the provision in Rule 52(a) of the Federal Rules of Civil Procedure that "findings of fact shall not be set aside *unless clearly erroneous*" (emphasis added) is the rule to be followed, even though the trial was on written instruments. The court states Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court.

1. The Capwell Lease Is Subject to California Law.

Paragraph 25 of the lease expressly obligates the lessee "to observe and comply with all federal, state, county and municipal laws now in effect or hereinafter enacted with respect to the occupancy of said leased premises." The trial court correctly determined the lease was subject, during the initial term thereof, to the provisions of Section 851 of the Public Utilities Code of the State of California and General Order No. 69 of the Public Utilities Commission. Even in the absence of an express provision in the lease subjecting it to California law, such laws and administrative regulations thereunder are a part of every lease entered into covering property in the State of California. Where parties make their contracts in contemplation of a law of the state, such law of the state becomes a part of the contract and certainly would be so enforced by the state court. *American National Bank & Trust Co. v. U.S. Fidelity & Guaranty Co.*, 7 F. Supp. 578, 582, *supra*.

The effect of Section 851 and General Order No. 69 is to authorize Railroad to permit use of Parcel One, described in the First Amended Complaint herein, for automobile parking purposes, subject to the termination of such per-

mission by either appellee or the Public Utilities Commission in the event it is determined such property is required for service to the patrons of appellee. The argument in support of this proposition has been fully set forth in prior discussion of the trial court's findings and will not be repeated for such reason.

2. The Capwell Lease Is Subject to the Provisions of Section 851 of the Public Utilities Code and to General Order No. 69 of the Public Utilities Commission Issued Thereunder.

As previously pointed out, Section 851 provides that no public utility shall lease property necessary or useful in the performance of its duty to the public without first having secured from the Public Utilities Commission an order authorizing it to do so and every lease made other than in accordance with the order of the Commission is void. In this instance, the Capwell lease was authorized by General Order No. 69 of the Commission subject to termination if the premises were required for service to appellee's patrons. The evidence previously referred to in support of the trial court's findings shows Parcel One is operating property subject to jurisdiction of the Commission.

B. THE TRIAL COURT CORRECTLY DETERMINED APPELLEE DID NOT CEASE TO OCCUPY THE PREMISES IN QUESTION FOR RAILROAD PURPOSES.

The appellants allege, on page 22 of their opening brief, that the nature of the property interest conveyed by the deed under which Railroad acquired title to the depot grounds is one of the following interests:

1. An easement or right of way for railroad purposes;
2. A determinable fee simple with the possibility of reverter;
3. A fee simple title subject to a right of entry for a condition broken.

The appellants further state it makes little or no difference as to which one of the three interests was conveyed by the deed in question.

It is appellee's position fee simple title is vested in Southern Pacific Company to the property described in the August 6, 1890 deed for the reason the provisions in the August 6, 1890 deed are unenforceable. Real property devoted to railroad purposes may be held by any recognized estate in land. *Lemon v. Los Angeles Terminal Ry.*, 38 Cal. App. 2d 659, 102 P.2d 387 (1940). "A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." Section 1105 of the Civil Code of the State of California. "A grant is to be interpreted in favor of the grantee." Section 1069 of the Civil Code of the State of California.

A deed by its express terms may be sufficient in form to convey to a railroad company the fee simple title to the property described therein, subject to reversion upon breach of the limitation or condition subsequent contained therein.[3]

Appellants cite the cases of *Highland Realty Co. v. City of San Rafael*, 46 Cal. 2d 669, 298 P.2d 15 (1956); *City of Glendora v. Faus*, 148 Cal. App. 2d 920, 307 P.2d 976 (1957); and *Tamalpais, etc. Co. v. Northwestern Pac. R.R.*, 73 Cal. App. 2d 917, 167 P.2d 825 (1946), in support of their contention that an easement for railroad purposes was conveyed by the August 6, 1890 deed. In the *Highland Realty*

3. In the following cases, the California courts held the deeds involved conveyed fee simple title subject to conditions subsequent. *Hannah v. Southern Pac. R.R.*, 48 Cal. App. 517, 192 Pac. 304 (1920); *Behlow v. Southern Pac. R.R.*, 130 Cal. 16, 62 P.2d 295 (1900); *Rosecrans v. Pacific Electric Ry.*, 21 Cal. 2d 602, 134 P.2d 245 (1943); *Moakley v. Blog*, 90 Cal. App. 96, 265 Pac. 548 (1928); *Goodman v. Southern Pacific Co.*, 143 Cal. App. 2d 424, 299 P.2d 321 (1956).

case, the railroad company filed an action in eminent domain to acquire a "right of way for the construction and use of the railroad upon, over and along a strip of land." Prior to trial of the action, the defendant conveyed the property by a deed which described the property in the same language used in the eminent domain complaint. In such circumstances, the court determined the parties intended that an easement be conveyed by such deed inasmuch as the railroad company was only entitled to acquire an easement by the condemnation action. In the *City of Glendora* case, the deed to the railroad company contained the following language in the granting clause: "The said party of the first part, *doth hereby, grant, bargain, sell and convey,* unto the said party of the second part, *for railroad purposes only, and* subject to the conditions hereinafter specified, all those certain pieces or parcels of land." The court in holding that an easement was granted by such deed distinguished the cases of *Hannah v. Southern Pac. R.R., supra, Behlow v. Southern Pac. R.R., supra,* and *Moakley v. Blog, supra,* in that such deeds contained statements concerning the purposes of the grants appearing in parts other than the granting clauses thereof. The deed involved in the *Tamalpais* case, *supra,* stated in the granting clause that the grantor "does grant unto the said party of the second part . . . for the uses and purposes hereinafter designated and stipulated and none other," the land described therein, "for the maintenance and operation of a railroad. . . ." The court concluded it was not necessary for purposes of its decision in the case to decide the nature of the estate conveyed by such deed.

In any event, inasmuch as the trial court found and determined appellee did not breach the provisions contained in the August 6, 1890 deed, it was not necessary for the trial court to determine the nature of the title conveyed

thereby. To such extent, the situation is analogous to the circumstances in the *Tamalpais* case, in which it was determined the railroad company did not breach the provisions contained in its acquisition deed and it was therefore not necessary to determine the nature of the title conveyed by such deed.

On page 23 of their opening brief, the appellants refer to the recital of a consideration of $1.00 in Railroad's acquisition deed. It is a matter of common knowledge, of which this court will take judicial notice, the amount of consideration stated in deeds is nothing more than a recital and does not disclose the true consideration received therefor. The grantors in the August 6, 1890 deed received a valuable consideration for their conveyance of the depot grounds, namely, the benefit derived from increased value of their adjoining property due to the construction of the San Ramon Branch Railroad. The deed was delivered to appellee's predecessor in interest in consideration of its construction of such railroad line, in compliance with the agreement of the grantors to do so upon completion of such railroad line (Ex. B).

Even though it is determined the above deed contains a provision subjecting the title acquired to reversion upon breach of the deed provision contained therein, it is settled law where the forfeiture of an estate conveyed for a specified purpose is by the terms of the deed predicated upon cessation of such specified purpose, an additional and different use of the property will not effect a forfeiture of such estate as long as the specified use is continued.[4]

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4. *Reclamation District v. Van Loben Sels,* 145 Cal. 181, 78 Pac. 638 (1904); *Lowe v. Ruhlman,* 67 Cal. App. 2d 828, 155 P.2d 671 (1945); *City of Santa Monica v. Jones,* 104 Cal. App. 2d 463, 232 P.2d 55 (1951); *Kouwenhoven v. New York Rapid Transit Corp.,* 9 N.Y.S. 2d 629, *aff'd* 24 N.E. 2d 485, 25 N.E. 2d 147 (1940);

> "The proprietor of a determinable, qualified, or base fee has the same rights and privileges over his estate, until the qualification upon which it is limited is at an end, as if he were a tenant in fee simple." 19 Am. Jur., *Estates* § 30 (p. 490).

> "Until its determination, a base, qualified, or determinable fee has all the incidents of a fee simple. . . ." 31 C.J.S., *Estates* § 10 (p. 23).

So long as appellee maintains its railroad line and depot at Walnut Creek in fulfillment of the purpose for which the land described in the August 6, 1890 deed was originally conveyed, appellee is entitled under such established principle of law to use and authorize others to use portions of the depot grounds for all purposes consistent with the maintenance and operation of the railroad line. There is no express obligation in the August 6, 1890 deed or under applicable law requiring appellee to restrict the issuance of leases for such purposes for a term less than five years. The case of *Kouwenhoven v. New York Rapid Transit Corp.,* 9 N.Y.S.2d 629, 24 N.E. 2d 485, 25 N.E. 2d 147, *supra,* involved the lease of railroad property for the term of 25 years for the maintenance of a store building, subject to the right of the railroad company to terminate lease at the end of the fifth, tenth, fifteenth or twentieth year of the term by giving one year's notice. The court held that the

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Priddy v. School Dist. No. 78, 219 Pac. 141 (Okla. 1923); *Lawson v. Georgia Southern & F. Ry.,* 82 S.E. 233 (Ga. 1914); *Hilton v. Central of Georgia Ry.,* 92 S.E. 642 (Ga. 1917); *Carlsen v. Carter,* 36 N.E. 2d 740, 137 A.L.R., commencing at page 639 (Ill. 1941); *Thompson on Real Property* (Perm. Ed.), Sec. 2104; *Regular Predestinarian Baptist Church v. Parker,* 27 N.E. 2d 522 (Ill. 1940); *Williams v. McKenzie,* 262 S.W. 598 (Ky. 1924); *Davis v. Skipper,* 83 S.W. 2d 318 (Tex. 1935); *Taylor v. Continental Southern Corp.,* 131 Cal. App. 2d 267, 280 P.2d 514 (1955); *City of Long Beach v. Marshall,* 11 Cal. 2d 609, 613, 82 P.2d 362 (1938).

entering into such lease did not constitute a breach of a deed provision which provided that the estate granted was subject to reversion whenever the same shall cease to be used for railroad purposes.

In discussing a case involving the conveyance of fee simple title to property on condition subsequent, the California Supreme Court stated in *Parry v. Berkeley Hall School Foundation,* 10 Cal. 2d 422, 426, 74 P.2d 738, 740 (1937), as follows:

> "The grantee takes the entire estate of the grantor, and unless he breaches the conditions is in the same position as an owner in fee simple absolute."

In *City of Santa Monica v. Jones,* 104 C.A. 2d 463, 232 P.2d 55, *supra,* the grantors made claim for compensation based on a reversionary interest in a deed to the Pacific Electric Railway Company. The condition of the deed was that the property should revert to the grantors, their heirs or assigns, (1) whenever the property shall not be used for railroad purposes, or (2) whenever the Railway Company shall cease to run daily passenger trains over the railroad, or (3) whenever any structure of any kind is erected by the Company on the property, except depots and such other structures as may be needed strictly for railroad purposes. The Railway Company had not run railroad passenger trains over the line for many years, but neither the grantors nor their heirs ever claimed a breach of the condition until after commencement of the condemnation suit. The heirs contended that the condition was breached in that the Company for a period of about twenty-five years had for a consideration permitted a signboard company to erect and maintain advertising signboards on the property removable upon twenty-four hours' notice. The

heirs also contended that the Railway Company since 1937 had leased from month to month a part of the property to a bus company for the purpose of parking buses, which was contrary to the condition that the property should not be used for any other purpose but railroad purposes. The Court declined to raise this type of an alleged breach to the dignity of a breach giving rise to a forfeiture, saying at p. 470:

> ". . . Moreover, as there is no showing by the heirs that they or their predecessors ever objected to the use of the property to park busses or place signboards thereon we see no occasion to grant any relief, whether they knew or did not know of the alleged violations. If they were not interested enough to check the property for violations, the violations must be regarded as altogether too minor to warrant forfeiture of a fee property, where, as here, it does not appear that any harm or benefit could accrue to the heirs. After all the law does not regard mere trifles as a basis for forfeiture."

In *O'Brien v. New York, N. H. & H. R. R.*, 179 N.Y.S. 160 (1919), the deed contained the following condition and restriction defining and limiting the use by the grantee of the parcel conveyed:

> "To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, their successors or assigns, forever, but only on the condition that the above described land shall be used for railroad purposes, to wit, *for the purpose of a passenger and freight depot and depot grounds and for the approaches thereto,* and in case at any time hereafter the premises shall cease to be used for the purposes aforesaid, then the title thereto shall revert to the said parties of the first part, their heirs and assigns."

Subsequent to receiving title to the tract of land in question, the railroad company occupied the premises for various purposes. It erected thereon a passenger station, a two-story frame building used as a storehouse, a one-story frame building for use as a power house for generating electricity to be used in raising and lowering a nearby drawbridge, but at the time of the trial was then used for storage purposes. It also erected a one-story sheet iron shop, a hydrant and hose building, a small tool house and other facilities in addition to the passenger station. The railroad company also constructed tracks upon the land for handling express trains, also another track which was used as a siding. No freight house or freight depot was ever erected upon the premises in question. The plaintiff sought to avail herself of the reversion clause contained in the deed because the premises in question had ceased to be used for the purposes mentioned in said deed. The Court said (179 N.Y.S. 160, at pp. 163-64):

> "In making the erections complained of, to some extent, at least, the appellant clearly exceeded any right or authority conferred by said deed. . . .
>
> "However, it is not necessary upon this appeal to determine whether or not the defendant railroad company exceeded its authority in making such erections. The question here is whether, under the deed to defendant, the premises conveyed have ceased to be used for the purposes contemplated, so that title has reverted to the original grantors and their heirs. Concededly the grantee has used said premises, or a portion thereof, for some of the purposes expressly mentioned in the deed, to wit, for the purpose of a passenger depot and depot grounds and for appoaches thereto, and for such purposes is still using the lands conveyed by plaintiff's ancestor and his cograntor.

"Respondent's position is . . . that by the unwarranted erections on the land the grantee forfeited all right thereto. I am unable to see the force of such contention. It does not seem to me that, by reason of doing more than it was permitted to do under its deed, the defendant necessarily forfeited title to the premises. . . .

"In other words, it was the plain intent of the parties that, when the premises should cease to be used for the purpose of a passenger and freight depot and depot grounds and for the approaches thereto, then the premises should revert to the grantors, their heirs and assigns. Such a contingency has not as yet arisen, as the premises are still occupied by the grantee for its passenger depot and depot grounds and for the approaches thereto.

"I think the plaintiff has entirely mistaken her remedy, and that under existing conditions ejectment will not lie. The premises have not as yet ceased to be used for some of the purposes described in the deed, and until the premises have ceased to be used for such purposes there can be no reversion of title."

As long as some part of the property is used for the purposes specified in the condition and the remainder is held and protected for the uses specified and contemplated, there is no breach of the condition and mere non-user is not evidence of abandonment. *Home Real Estate Co. v. Los Angeles Pacific Co.,* 163 Cal. 710, 126 Pac. 972; *Ocean Shore R.R. v. Spring Valley Water Co.,* 87 Cal. App. 188, 262 Pac. 53. There is no provision in the August 6, 1890 deed requiring the property described therein to be used and occupied only for railroad purposes. Likewise, there is no obligation on appellee's part to use every square foot of the depot grounds for railroad purposes. *Goodman v. Southern Pacific Co.,* 143 Cal. App. 2d 424, 299 P.2d 321, *supra.* On the other hand, there is a strong and prevailing policy

in the law which favors property being placed to productive use. Where property is dedicated to public use for railroad purposes, it is in the interest of all concerned that the railroad company be permitted to lease such portions of its property as may be available for other interim uses to offset taxes and administrative expenses incurred during the period such property is held and kept available for future railroad requirements. In the *Goodman* case, the trial court held that Southern Pacific Company was entitled to the exclusive possession of the property, together with the right to use the property for any and all lawful purposes as long as use of the property for railroad purposes is not obstructed or interfered with. The California District Court of Appeals, in affirming the trial court judgment, did not disapprove such holding of the trial court.

The California courts have consistently held that construction of a railroad facility on a portion of its property is sufficient for the railroad company to retain the right to possession and use of the entire parcel of land granted for railroad purposes. The rule is that the possession of part of a railroad right of way is possession of the whole.

In *Southern Pacific Co. v. Burr,* 86 Cal. 279, 24 P. 1032, (1890), involving a portion of railroad right of way acquired under an Act of Congress, the Court states on page 284:

> "Here there was a special grant of a right of way two hundred feet in width on each side of the road. This grant is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true, the strip of land now actually occupied by the road-bed and telegraph line may be only a small part of the four hundred feet

> granted, but this fact is of no consequence. The company may at some time want to use more land for side-tracks, or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so."

Southern Pacific Co. v. Hyatt, 132 Cal. 240, 64 P. 272, (1901), is another case involving railroad right of way, where the Court stated on page 244:

> "The construction and operation of one track on its location is an assertion of right to the entire width of its right of way. The presence of one track constantly in use is a definite badge of ownership, and the only practical assertion of title that can be made."

The testimony of witness John N. Cetinich touched upon some of the contemplated changes in railroad operations which affect the San Ramon Branch (R.T. 68-73). Appellee must be permitted to retain ownership of its depot grounds at Walnut Creek for railroad purposes in order to provide service as required to the public as a common carrier. To the extent appellee is so obligated to serve the public, it has correlative rights to lease its property for other interim uses to defray the expense of holding its property available in order that it may be in a position to fulfill such obligation. Considering all the circumstances involved, it is submitted that appellee has not committed a breach of the provisions in the August 6, 1890 deed sufficient to invoke a forfeiture of its title to the property involved herein.

C. ANALYSIS OF THE CLAUSE "CEASE TO OCCUPY SAID PREMISES FOR RAILROAD PURPOSES" CLEARLY INDICATES, AS THE TRIAL COURT FOUND, THAT THERE HAS BEEN NO BREACH OF THE PROVISION CONTAINED IN THE AUGUST 6, 1890 DEED.

The words in the above quoted clause are very narrow in application and do not support appellants' contention the deed provision herein involved has been breached.

1. Cease.

The question the court has to determine is whether the defendant Southern Pacific Company has *ceased to occupy the premises for railroad purposes.*

The meaning of the word "cease" is found at 11 C.J., *Cease* (p. 45), as follows:

> "Cease. To put a stop to; to be done away with; to be an extinction.[19]"

Note 19 above cites the California case of *Thomason v. Ruggles,* 69 Cal. 465, 470, 11 Pac. 20 (1886), which is as follows:

> "To cease is to put a stop to; to be done away with; to be an extinction (Webs. Dic.)."

The definition of the word "ceased" applies to an extinction of the use for railroad purposes, or a permanent abandonment rather than a mere temporary cessation. It is not a broad word, but narrow in application. In applying the definition of "ceased" to the facts, one must ascertain whether the use for railroad purposes has been done away with or come to an end, that is, is it extinct, or is the railroad use still possible? Also from the definitions hereafter set forth, there also must be a discontinuance and an abandonment of a permanent nature rather than a mere temporary cessation. All of these matters point out the narrow application of the word "cease". For appellants to prevail, they must first prove that the use of the land in question for railroad purposes is extinct or has come to an end. Appellants cannot show such a factual situation since the opposite is true, for the railroad has used and has the right and duty to put the property to use for railroad purposes when the need arises.

Further discussion of the meaning of the word "cease" is found in the text at 14 C.J.S., *Cease* (p. 58), as follows:

"In its intransitive sense, it has been defined as meaning to be done away with or to be an extinction; to become extinct or pass away; to come to an end, or stop. In its transitive sense, to put a stop to; to stop or put an end to.

" 'Cease' has been contrasted with 'continue,' and, in a particular connection, distinguished from 'vacate and dismiss.' It has been said that 'cease' is generally used to indicate cessation of activity rather than to describe an activity in opposition to that then existing; that it implies a prior existence, a discontinuance, *and permanent abandonment rather than mere temporary cessation;* and, under some circumstances, a discontinuance of purpose as distinguished from a cessation of physical existence." (Emphasis supplied.)

2. Railroad Purposes.

The meaning of the words "railroad purposes" can be best determined from the cases construing the same. To understand what is a railroad purpose, it is to be remembered a railroad has two primary functions, the first, to move its traffic, that is, operate its cars upon its tracks, and the second, to provide facilities for the proper loading, unloading, and dispatch of the cars. Also it seems obvious that a railroad should plan for the future as well as the present. A railway may use its railroad easement for delivering and loading facilities and supporting businesses.

As said in one text, 74 C.J.S., *Railroads,* § 99 (p. 500):

". . . a railroad company may use land acquired by it for a right of way for the erection of a freight depot, warehouse, water tanks, necessary side tracks and switches, turntables, and other structures or buildings necessary or proper for facilitating the transaction of its ordinary business."

Further, see 74 C.J.S., *Railroads*, § 101 (p. 508), as follows:

> "... a railroad company may permit the erection of warehouses, elevators, or other buildings or platforms thereon for convenience in delivering and receiving freight. ..."

Also, the text in 44 Am. Jur., *Railroads*, § 131 (p. 345) states:

> "Generally, a railroad may permit persons to carry on business or render services incidental to its railroad business, on its property, where it could perform such business or services itself."

That a railroad right of way may be leased for lumber yards as well as grain elevators, stock yards, warehouses, and other supporting businesses, under an easement restricting it to use for railroad purposes, is a proposition supported by numerous authorities.

Gurney v. Minneapolis Union Elevator Co., 63 Minn. 70, 65 N.W. 136, 30 L.R.A. 534, 536;
Grand Trunk R.R. v. Richardson, 91 U.S. 454, 23 L.Ed. 356, 361;
Illinois Central R.R. v. Wathen, 17 Ill. App. 582, 590;
Michigan Central R.R. v. Bullard, 120 Mich. 416, 417, 79 N.W. 635.

In *City of Long Beach v. Pacific Electric Ry.*, 44 Cal. 2d 599, 603, 283 P.2d 1036 (1955), the California Supreme Court said:

> "But a railroad may use its right of way for many commercial purposes unless specifically prevented from so doing. For example, the following uses for a railroad right of way have been held to be proper since they contribute to the railroad's business: a sawmill, lumber shed, store or boarding house (*Grand Trunk*

> *R.R. v. Richardson*, 91 U.S. 454 [23 L.Ed. 356]); a manufacturing company (*Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416 [79 N.W. 635]); a grain elevator and warehouse (*Gurney v. Minneapolis Union Elevator Co.*, 63 Minn. 70 [65 N.W. 136, 30 L.R.A. 534]); a lumber yard, corn crib, grain elevator and warehouses (*Illinois Cent. R. Co. v. Wathen*, 17 Ill. App. 582).
>
> "Since railroads may use their rights of way for certain commercial activities, the taking of a portion of it which is being used, *or is capable of being used, for commercial purposes* in order to create or extend a public street, ordinarily would cause more than nominal damage to the railroad." (Emphasis added.)

Thus, the California courts in the use of the phrase "which is being used, or is capable of being used for commercial purposes", considers not only present, but also future use.

The cases of *Sparrow v. Dixie Leaf Tobacco Co.*, 61 S.E. 2d 700 (1950), *Bond v. Texas and Pacific Ry.*, 160 So. 406 (1935), and *Connolly v. Des Moines and Central Iowa Ry.*, 68 N.W. 2d 320 (1955), cited by appellants in their opening brief, represent the minority view with respect to the use a railroad company is permitted to make of its railroad right of way. Inasmuch as the California Supreme Court has decided this matter in accordance with the majority view, this court should follow the view of the California court with respect to such matter where it is clearly expressed as in the case of *City of Long Beach v. Pacific Electric Ry.*, 44 Cal.2d 599, 283 P.2d 1036, *supra.*

3. Occupy.

The basic language under consideration in the deed is "cease to *occupy* said premises for railroad purposes".

That defendant is keeping the land in question for future use for railroad purposes is obvious.

The California case of *People v. Ines*, 90 Cal. App. 2d 495, 498, 203 P.2d 540, 542 (1949), pointed out:

> "In *People v. Roseberry*, 23 Cal. App.2d 13, 14 [71 P.2d 944], the word 'occupy' is defined as follows: '... To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; *to tenant;* to do business in' (citing Webster's New Intl. Dict., 1921)." (Emphasis supplied.)

In *Grillo v. Maryland*, 120 A.2d 384, 388, 209 Md. 154 (1956), it was said:

> ". . . 'To occupy' means to hold in possession; *to hold or keep for use.* Missionary Society of Methodist Episcopal Church v. Dalles City, 107 U.S. 336, 2 S.Ct. 672, 27 L.Ed. 545." (Emphasis added.)

The word "occupy" has so many meanings it is difficult to apply any particular meaning unless the facts are specifically studied. This matter was pointed out in *Richards v. Sellers,* 104 Cal. App. 30, 32, 285 Pac. 391, 392 (1930), as follows:

> "The words 'occupied' and 'unoccupied' have many meanings. . . . Each case must stand on its own facts."

4. Said Premises.

The meaning of the words "said premises" is clear in this case. It refers to the entire 4.04-acre parcel of land described in the August 6, 1890 deed. There is no limitation, express or implied, that the words shall apply to the portions of the parcel of land which are described in the complaint as Parcel One. The fact that a railroad depot has been constructed on the depot grounds and has been continuously maintained and operated and that the remainder of such property has been kept available for required rail-

road use is sufficient performance on appellee's part to fulfill the requirements of the deed provision. In the case of a railroad right of way, it has been held the presence of one track thereon is a sufficient badge of ownership of the entire width of the right of way, even though portions thereof are not occupied by rail facilities. *Southern Pacific Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, *supra*.

The words "said premises" in the provision contained in the August 6, 1890 deed clearly refer to the whole of the property described therein. If the grantors intended such provision should apply to only a portion of the property, they could have easily so provided in the deed. It is not the function of this court to interpret the deed to give a meaning thereto which is accomplished by rewriting it. *Foley v. Euless*, 214 Cal. 506, 6 P.2d 956 (1931).

In this case, the grantors in the above deed, by an instrument dated August 31, 1890 (Ex. B), agreed to convey to the Southern Pacific Railroad Company all necessary lands for the right of way and depot grounds for the San Ramon Branch Railroad. It is obvious the grantors knew that only a small portion of the depot grounds at Walnut Creek would be occupied by the depot constructed thereon and the remainder of the property would be held and used for such other purposes as the railroad company authorized consistent with its requirements. There have been in effect during the period of appellee's ownership of such depot grounds a substantial number of leases covering its use for varied purposes (Exs. A-D to A-N inclusive). Portions of the depot grounds have been used for lumber and shingle yard purposes (Exs. A-D, A-E, A-K and A-L), for storage of rock, sand and gravel (Ex. A-F), for storage of poles and pipes (Exs. A-G, A-H, A-I and A-J), and for cultivation purposes (Ex. A-N). The fact the grantors and their

heirs did not object to leases for various purposes, entered into by appellee prior to the lease involved in this action, shows they intended and acknowledged that appellee was and should be entitled to lease the depot grounds for any and all purposes so long as the railroad line and depot were maintained at Walnut Creek. Appellee has carried out the intent of the parties to the August 6, 1890 conveyance by faithfully maintaining its railroad line and depot at Walnut Creek as shown by the affidavit of A. S. McCann (Ex. Z). The evidence shows that appellee has paid all taxes assessed against the depot grounds as stated in the affidavit of F. B. Magruder (Ex. Y). The evidence further shows a substantial volume of rail shipments has been handled at the Walnut Creek depot (Exs. A-Q and A-R).

In face of the above evidence, it is apparent the doctrine of partial reversion is not applicable to the property conveyed by the August 6, 1890 deed. The hypothetical situation mentioned on page 31 of appellants' opening brief has no bearing in this matter. The facts of this case speak for themselves and show clearly that the dominent purpose for which the depot grounds were conveyed has been complied with and fulfilled by the construction and maintenance of the railroad line and depot at Walnut Creek. The law is clear that, so long as appellee continues to maintain its railroad line and depot at Walnut Creek, appellee's interest therein is equivalent to fee ownership and it is entitled to use such portions of the depot grounds for any and all purposes not inconsistent with maintenance of the depot thereon for so long as the railroad line and depot are, in fact, maintained at Walnut Creek.

Appellants refer to the case of *Tamalpais Land and Water Co. v. Northwestern Pac. R.R.*, 73 Cal. App. 2d 917, 167 P.2d 825, *supra*, where it is stated some courts have held that a partial abandonment extinguishes so much of

a granted right as may have been abandoned. The case of *Atlantic Coast Line R.R. v. Sweat,* 177 Ga. 698, 171 S.E. 123 (1933), which is referred to in the *Tamalpais* case, involves a deed granting an easement for railroad purposes, subject to the provision that the property conveyed would "revert to the said party of the first part whenever said road shall be abandoned." On page 129 of the decision, the court states:

> ". . . Upon a proper construction of the contract, the word 'road' should be held to mean that part of the railroad to be constructed through the land lot in question, and not the entire line of railroad of the grantee; and the word 'abandoned' should be interpreted in the light of the other language used, and not in a technical sense. Upon a construction of the whole instrument with a view of ascertaining the intention of the parties, a failure to 'maintain and use said road' as above defined would constitute an abandonment within the purview and meaning of the particular agreement. While the nonuser alone will not ordinarily constitute an abandonment, the parties to the grant here under construction virtually contracted that a nonuser would amount to such."

After stating that an entire contract may be apportioned in some cases, the court continues, on page 130 of the decision, as follows:

> "This case is distinguished from the cases relating to apportionment, relied on by counsel for the railroad company, in none of which was the easement founded upon a contract of the character of the one here under consideration."

The holding in the *Atlantic* case is not applicable to the facts in the case at hand inasmuch as property interest therein was an easement subject to abandonment rather

than a fee title subject to reversion and was based upon interpretation of a particular deed provision in which the court departed from the generally accepted principle that a contract is entire and not divisible.

Appellants also refer in their opening brief to the case of *Virginia Ry. v. Avis*, 98 S.E. 638 (1919), relating to the doctrine of partial reversion. However, this case is not concerned with reversion of title, but deals with the question of whether the grantor is entitled to enforce a covenant in a deed providing that the land conveyed shall be used for a depot and facilities connected therewith. In view of the language in such deed provision, the court held that the land owner was entitled to enjoin the use of land for a purpose other than that which was stated in such deed provision. The court refers to the case of *Bolling v. Petersburg*, 8 Leigh (35 Va.) 224, where the intention of the grantors in the deed there involved was to require the maintenance of a court house on the land conveyed and not to further restrict its use. The court found that the distinction between the *Bolling* and *Avis* cases is plain. In the *Bolling* case, the intention of the parties was to require the use which should be made, while in the *Avis* case, the intention of the parties was to specify the use which might be made. The court stated, at page 641 of the *Avis* case:

> "This, we think, is the true distinction between the two cases. If the deed from Avis had said that the land was conveyed on condition that a depot should be erected and maintained thereon, then it would be simple and easy enough to say that there was no restriction upon the use of any part of the land not needed for the depot; but the language of the covenant which actually was embodied in the deed seems to us to plainly limit the use of the additional land to facilities connected with the depot."

The facts in the *Bolling* case are analogous to the facts in the case at bar and substantiate appellee's position in this matter in accord with the great weight of authority that in the case of a grant of an estate by a deed for a specified purpose (construction, maintenance and operation of a railroad line and depot herein), by the terms of which termination of the estate is predicated upon cessation of the specified use of the property, an additional and different use made of the property will not affect a forfeiture or termination of the estate granted so long as the specified use is continued. Under this established principle of law, appellee is entitled to lease the depot grounds at Walnut Creek, consistent with its authority to do so under regulatory statutes, so long as the railroad line and depot at Walnut Creek are maintained.

D. THE HOLDING IN THE CASE OF McDOUGALL V. PALO ALTO SCHOOL DISTRICT, 212 ADV. CAL. APP. 420 (1963), DISCUSSED ON PAGES 34 AND 35 OF APPELLANTS' OPENING BRIEF, IS NOT INCONSISTENT WITH THE TRIAL COURT'S FINDINGS IN THIS CASE.

In the *McDougall* case, the District removed all school buildings in 1940 from land acquired under a deed providing the title thereto would revert to the grantor if the District failed to use the land for common school purposes. The District did not make any further use of all the land for school purposes. The deed expressly provided it was given for the purpose of furnishing a site for a schoolhouse and to be used as a public school for the sole use and benefit of the School District. It is thus readily apparent the circumstances in the *McDougall* case and the case at hand are not similar.

II. Appellants Are Not the Owners of the Parcel in Question and They Are Not Entitled to Maintain This Action.

A. THE APPELLANTS ARE NOT THE OWNERS OF PARCEL ONE DESCRIBED IN THE FIRST AMENDED COMPLAINT.

The trial court found (finding X) the grantors in the August 6, 1890 deed and their heirs disposed of all their lands which adjoined Parcel One and properly concluded (conclusion V) the appellants "do not have an enforceable right, claim or interest in the further compliance on the part of defendant (appellee) or those claiming under defendant with the conditions contained in said deed." The trial court further found (finding V) that the August 6, 1890 deed conveying the depot grounds was delivered to appellee's predecessor in interest in consideration of the benefit to the grantors' adjoining land and their ownership thereof as a result of the construction of the San Ramon Branch Railroad. Inasmuch as such grantors and their heirs no longer own the lands adjoining such depot grounds, the above benefit to their ownership of adjoining lands has ceased by reason of such disposition. It is a maxim of California jurisprudence "where the reason is the same, the rule should be the same" (section 3511 of the Civil Code of the State of California). Since appellants no longer own the adjoining land to receive benefits thereof, appellants no longer have reason to enforce the provisions contained in the August 6, 1890 deed for continuation of benefits derived therefrom. In the circumstances, the trial court's conclusions are correct and in accordance with its findings.

B. APPELLANTS AND THEIR PREDECESSORS IN INTEREST HAVE CONVEYED TO OTHERS THE LAND ADJACENT TO THE DEPOT GROUNDS BY DEEDS IN WHICH THE PROPERTY DESCRIPTION "CALLED" THE "RAILROAD RIGHT OF WAY."

Appellee's engineer testified "the call on each of the sale deeds was to the Southern Pacific right of way" (R.T. 29, lines 12, 13). In the case where monuments are inconsistent with measurements, the monuments are paramount. When a road is the boundary, the rights of the grantor to the middle of the road are included in the conveyance (section 2077, Code of Civil Procedure of State of California). Calls to monuments prevail over measurements. *Ferris v. Coover,* 10 Cal. 589, 629 (1858); *Weaver v. Howatt,* 161 Cal. 77, 80, 118 Pac. 519, 520 (1911).

On page 38 of their opening brief, appellants contend the Walnut Creek station grounds can not be properly referred to as a "railroad right of way" for purposes of applying the "highway rule", namely, that a conveyance of land adjoining such right of way carries with it the interest of the grantor to the center line of the right of way. However, the facts in this case show the grantors and their heirs, in conveying to others their adjacent land, referred to such station grounds as "railroad right of way" in the deed descriptions. As the trial court aptly states, "the deeds should speak for themselves" (R.T. 30, line 20). Since the appellants and their predecessors in interest chose to refer to the station grounds as "railroad right of way" and also chose to "call" such "right of way" in the descriptions of the property conveyed to others by their deeds, they are estopped to assert the station grounds should not be referred to as railroad right of way for purposes of the "highway rule."

The general rule is that conveyances of lands bounded by railroad rights of way are construed in the same manner

as conveyances of lands bounded by streets, highways, or non-navigable streams, as conveying the interest of the grantor therein.[5] Railroad rights of way are considered to be highways dedicated to a public use.[6]

There is a strong public policy against construing deeds in a manner which will leave in the grantor title to long, narrow slivers and strips of land of no use to him, creating a source of future litigation.[7] The conveyance by the appellants and their predecessors in interest of the land adjoining such railroad right of way carried with it all of their interest therein.

California courts have held that it serves no practical purpose and would be inequitable to invoke a forfeiture of title where the holder of the right of re-entry is not the owner of an interest in the adjoining lands.[8]

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5. *Rio Bravo Oil Co. v. Weed,* 50 S.W.2d 1080, 1084-85 (Tex. 1932), *cert. denied,* 288 U.S. 603 (1933); *Center Bridge Co. v. Wheeler & Howes Co.,* 86 Atl. 11, 12 (Conn. 1913); *Roxana Petroleum Corp. v. Sutter,* 28 F.2d 159, 161, 162 (8th Cir. 1928); *Obringer v. Minnotte Bros. Co.,* 42 A.2d 413 (Pa. 1945); *Pyron v. Blanscet,* 238 S.W.2d 636, 637 (Ark. 1951); *New Orleans & Northwestern R.R. v. Morrison,* 35 So.2d 68 (Miss. 1948); *Oklahoma City v. Dobbins,* 117 P.2d 132 (Okla. 1941); *Broderick v. Tyer,* 187 S.W.2d 476 (Mo. 1945); *Boney v. Cornwell,* 109 S.E. 271, 274 (S.C. 1921); *Joslin v. State,* 146 S.W. 2d 208, 210 (Tex. 1940); *Talbot v. Massachusetts Mut. Life Ins. Co.,* 14 S.E. 2d 335, 337 (Va. 1941); *Church v. Stiles,* 10 Atl. 674, 675 (Vt. 1887); *Eureka Real Est. & Inv. Co. v. Southern Real E. & F. Co.,* 200 S.W. 2d 328, 333 (Mo. 1947).

6. 2 Cal. Jur. 2d, *Adverse Possession* § 13 (p. 512); *San Francisco, A. & S. R.R. v. Caldwell,* 31 Cal. 367, 371 (1866); *Southern Pacific Co. v. Hyatt,* 132 Cal. 240, 242, 64 Pac. 272 (1901); *Long Beach v. Payne,* 3 Cal. 2d 184, 189, 44 P.2d 305 (1935); 44 Am. Jur., *Railroads* § 8 (p. 220); 51 C.J., *Railroads* § 6 (p. 409).

7. *Brown v. Bachelder,* 214 Cal. 753, 755, 7 P. 2d 1027, 1028 (1932); *Anderson v. Citizens Savings & Trust Co.,* 185 Cal. 386, 197 Pac. 113 (1921).

8. *Alexander v. Title Insurance & Trust Co.,* 48 Cal. App. 2d 488, 119 P.2d 992 (1941); *Townsend v. Allen,* 114 Cal. App. 2d 291, 250 P.2d 292 (1952).

There is a strong presumption that upon conveyance of property adjoining a railroad right of way the grantor intends to convey his interest in the adjoining railroad right of way.[9]

The common law presumption was discussed in *Anderson v. Citizens Savings & Trust Co.*, 185 Cal. 386, 394-96, as follows:

> "The authorities in which the exact situation found here is presented are not very numerous and are in conflict and it would be of little purpose to review them. They are collated in the note to *White v. Jefferson*, 110 Minn. 276, [124 N.W. 373, 125 N.W. 262], as reported in 32 L.R.A. (N.S.) 778. The question is considered at length and with great care by the United States circuit court of appeals for the sixth circuit in *Paine v. Consumers' etc. Co.*, 71 Fed. 626, [19 C.C.A. 99], Judge Taft delivering the opinion. Among the reasons advanced by the opinion in support of the view which it adopts is the following, the force and good sense of which are sufficient, it seems to us, to resolve any doubt in the matter. It is said (page 632):
>
> > 'The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases. For a very good state-

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9. *Anderson v. Citizens Savings & Trust Co.*, 185 Cal. 386, 392, 393, 394, 395, 197 Pac. 113 (1921); *Brown v. Bachelder*, 214 Cal. 753, 7 P.2d 1027 (1932); *Roxana Petroleum Corp. v. Sutter*, 28 F.2d 159 (8th Cir. 1928); *Pyron v. Blanscet*, 238 S.W. 2d 636 (Ark. 1951); *New Orleans & Northwestern R.R. v. Morrison*, 35 So. 2d 68 (Miss. 1948); *Oklahoma City v. Dobbins*, 117 P.2d 132 (Okla. 1941); *Boney v. Cornwell*, 109 S.E. 271 (S.C. 1921); *Obringer v. Minnotte Bros. Co.*, 42 A.2d 413 (Pa. 1945).

ment of the present condition of the law on the subject, reference may be had to the new and valuable work of Mr. Dembitz on Land Titles, section 11. Most of the decisions are rested on some peculiarity of phrase in the description, and it is very difficult to lay down any general rules for determining when the grantor has used language sufficiently explicit to exclude from the operation of the deed the fee to the center of the abutting road. The supreme judicial court of Massachusetts has decided that it is impossible, if any respect is to be paid to the principles of the common law of real estate, to hold that a fee in land not described can pass as appurtenant to that which is described. (*Tyler v. Hammond,* 11 Pick. (Mass.) 193.) But in the later case especially that court has used every device of logic to include in the description of a lot by the side of a road the fee to the center of the road. It has treated the highway or private way in the description of a lot as a monument, and in obedience to the rule that a reference to monuments controls descriptions by courses and distances it has carried the lot to the center line of the monument, however clear a departure this may be from the linear or superficial measurements. It would seem from the language of Mr. Justice McLean, speaking for the supreme court of the United States in *Barclay v. Howell,* 6 Pet. 512, [8 L. Ed. 498], that the difficulty of passing the fee in the adjoining street as appurtenant to the conveyance of the abutting lot did not weigh so heavily on that court, for he said:

> ' "Where the proprietor of a town disposes of all his interest in it, he would seem to stand in a different relation to the right of soil, in regard to the streets and alleys of the town, from the individual over whose soil a public road is established, and who continues to hold the land on both sides of it. Whether the purchasers are not, in this re-

spect, the owners of the soil over which the streets and alleys are laid, as appurtenant to adjoining lots, is a point not essentially involved in this case."

'The whole question is most exhaustively discussed by the learned American editors of Smith's Leading Cases (8th ed., vol. 2, p. 178) in the notes of *Dovaston v. Payne,* and the conclusion reached that the treatment of the highway as a monument furnishes the means to include the fee to the street center in every case where there is not express language excluding it. (See, also, 3 Kent's Com. 349.) The wisdom of such a construction is manifest, and the great weight of authority sustains it.' "

The majority rule in the United States is that a conveyance of land bounded by a railroad right of way ordinarily passes the fee to the center thereof, if the grantor owns so far. (11 C.J.S., *Boundaries* § 45 (p. 594). See also *Roxana Petroleum Corp. v. Sutter,* 28 F.2d 159; *Rio Bravo Oil Co. v. Weed,* 50 S.W. 2d 1080; *Talbot v. Massachusetts Mut. Life Ins. Co.,* 14 S.E. 2d 335, and cases referred to in those decisions.) These cases seem more convincing and reasonable than those such as *Stuart v. Fox,* 152 Atl. 413, which support the minority view.

Although it may be contended that, under Civil Code sections 831 and 1112, California is legislatively committed to the minority rule, these sections do no more than codify the rule already adopted by the court in *Kittle v. Pfeiffer,* 22 Cal. 484 (1863). Even if because of these sections the California rule on grants bounded by streets and highways is deemed entirely statutory, this does not mean that California does not follow the common law rule when the land is bounded by a railroad right of way. Any contention that

these sections were intended to restrict the rule to highways and exclude all other types of boundaries is belied by the fact that California follows the same rule as to center line (or thread of the stream) where the boundary is a stream or other non-navigable water course. (*Rubel v. Peckham*, 94 Cal. App. 2d 834, 211 P.2d 883 (1949).) *Canal Oil Co. v. National Oil Co.*, 19 Cal. App. 2d 524, 66 P.2d 197 (1937), does not purport to limit the rule to roads or streets only. While it does point out that the right of way in question was "a mere private easement", if that were the complete answer, there would be no reason for the court to refer to that portion of section 831 that provides "but the contrary may be shown" and to point out that the deeds in question clearly showed a contrary intent by express language in the deed calling the side of the canal right of way as a boundary line.

In so far as the streets are concerned, the presumption that the grant carries to the center of the street is highly favored in law. (*Brown v. Bachelder, supra; Anderson v. Citizens Savings & Trust Co., supra.*) It has been held that a grant describing a street as a boundary for property carries title to the center of the street, although the street was never dedicated and even though it had been abandoned before the deed referring to it as a boundary was made (*Machado v. Title Guarantee & Trust Co.*, 15 Cal. 2d 180, 99 P.2d 245 (1940)). These cases all adopt the reasoning and the authorities relied upon as establishing the majority rule as to railroad rights of way. The court in *Anderson v. Citizens Savings & Trust Co., supra,* at page 394, refers to the conflict of authority outside the state as to private ways. It makes no reference to the conflict having been resolved in California by the Code sections mentioned. The latter case aligns California with the jurisdiction following the ma-

jority rule, with the result that the majority rule is applicable in California to all cases, including railway rights of way.

It has been held that when the holder of a right of re-entry has no interest in the adjoining lands and the condition was for the benefit of the adjoining land, it is not enforceable. In an action for declaratory relief and to quiet title to realty, the enforcement of a restriction as to the use of the realty was held to be inequitable due to changed conditions. *Alexander v. Title Ins. & Trust Co.*, 48 Cal. App. 2d 488, *supra*. In affirming the judgment which relieved the land from the operation of such restriction, the court said (pp. 492-93):

> ". . . This vendor, having sold the land and having left in its hands the bare reversionary right, is in the extraordinary position of being the owner of rights usually attributable to the owner of a dominant tenement, retaining them while selling the entire tract of land under restrictions which make them all servient to its bare and bodyless right. Being in this position, it has not concerned itself with the enforcement of this equitable right for the benefit of those landowners who purchased their property with a knowledge of and doubtless in reliance upon the restrictions in those earlier days when they appeared just and proper."

In *Townsend v. Allen*, 114 Cal. App. 2d 291, *supra*, the grantee in possession brought an action to quiet title against the holders of the reversionary interest, successors of the plaintiff's grantor. The defendants had acquired, but before this action had sold, the adjoining land. The plaintiff's land was subject to an express condition restricting its use. Judgment for the plaintiff was affirmed (pp. 294-95):

> "It may be conceded that where the Deysher deed stated the restrictions involved to be express conditions

> and gave a right of reentry in case of violation without any indication that possible forfeiture was not intended by the parties, and where said restrictions were not unlawful or unreasonable, said conditions were, when made, valid and enforceable as written. (*Rosecrans v. Pacific Elec. Ry. Co.*, 21 Cal. 2d 602, 605 [134 P.2d 245]; *Wedum-Aldahl Co. v. Miller,* 18 Cal. App. 2d 745, 750 [64 P.2d 762].) However it does not follow from the character of said restrictions as conditions subsequent with right of reentry that said restrictions must be secure from attack in equity when *changed circumstances or prior conduct of the party seeking enforcement* has caused said enforcement to be purposeless or inequitable. In California cases such circumstances have long since led to avoidance of restrictions notwithstanding the fact that they were in the form of conditions subsequent. . . ."

In this case, appellants seek to recover a strip and gore that is long, narrow and has no access to outside world (R.T. 47). As far as access is concerned, obviously appellants can not put the strip to productive use. The strip of land was conveyed in consideration of the construction of a railroad line at Walnut Creek (Ex. B). The railroad line has been constructed and maintained (Ex. B). Appellants' predecessors have conveyed away their adjoining land (Ex. Y). It is therefore obvious appellants no longer have any interest in the property in question under the applicable rule of law as set forth at 19 Am. Jur., *Estates* § 91 (pp. 553-54):

> "Where one conveys part of his land on condition subsequent that something be done which will benefit the rest of his property, a conveyance of the rest of his property is a waiver of the grantor's right to declare a forfeiture for breach of the condition subsequent."

The case of *Stevens v. Galveston H. & S. A. Ry.,* 212 S.W. 639 (1919), is directly in point in this matter. There the court held that the grantor was not entitled to invoke a forfeiture under a deed provision where the trial court found the grantor had conveyed away all the adjoining property intended to be benefited by the enforcement of the deed provision.

In their closing argument at page 41 of their opening brief, appellants refer to the case of *Goodman v. Southern Pacific Co.,* 143 Cal. App. 2d 424, 299 P.2d 321, *supra,* in which it was stated the reversionary rights under the particular deed involved shall remain in effect. However, the facts in the *Goodman* case were different than the case at hand, inasmuch as there was no evidence before the court nor any trial court finding the plaintiffs (owners of the reversionary interest) had disposed of their interest in adjoining lands, and for such reason the above statement in the *Goodman* case has no bearing on the matter at hand.

III. The "Law Abhors Forfeiture" and the Deed in Question Is to Be Construed So as Not to Cause a Forfeiture if at All Possible.

The general rule is that deeds shall be construed strictly against the enforcement of a forfeiture. It is well established that forfeitures are not favored in law and provisions providing therefor shall be construed strictly against the enforcement of a forfeiture.

The statutory law upon this subject is found in section 1442 of the Civil Code of the State of California, which provides:

> "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."

Section 1069 of the Civil Code of the State of California is also pertinent and reads in part as follows:

> "A grant is to be interpreted in favor of the grantee. . . ."

The rule of the cases in this matter is clear and may be summed up in the statement that "the law abhors forfeiture." The following are typical statements of the courts' approach to the problem:

> "Forfeitures are not favored in law and conditions providing for the forfeitures of an estate are to be construed liberally in favor of the holder of the estate, and strictly against the enforcement of the forfeiture."
>
> *Michaelian v. Elba Land Co.,* 76 Cal. App. 541, 554 (1926).

> "Conditions subsequent are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction."
>
> *Connor v. Lowery,* 94 Cal. App. 323, 326 (1928).

> "If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so."
>
> *Quatman v. McCray,* 128 Cal. 285, 289 (1900).

In 42 Cal. Jur. 2d, *Railroads* § 74, p. 62, the text statement is as follows:

> "Since forfeitures are not favored, a condition subsequent in a deed to a railroad corporation will be construed liberally in favor of the railroad and strictly against forfeiture."

Since the law abhors forfeiture, and since the law does not favor forfeiture, a forfeiture will be enforced only where no other interpretation is reasonably possible.

Lowe v. Ruhlman, 67 Cal. App. 2d 828, 832, 155 P.2d 671, 673 (1945);

McPherson v. Empire Gas & Fuel Co., 122 Cal. App. 466, 473, 10 P.2d 146, 148 (1932);

Milovich v. City of Los Angeles, 42 Cal. App. 2d 364, 373-74, 108 P.2d 960, 965 (1941).

In fact, if the agreement can be reasonably interpreted so as to avoid forfeiture, it is the court's duty to do so.

Quatman v. McCray, 128 Cal. 285, 289, 60 Pac. 855, 856 (1900);

Ser-Bye Corp. v. C. P. & G. Markets, 78 Cal. App. 2d 915, 919, 179 P.2d 342, 345 (1947);

McNeece v. Wood, 204 Cal. 280, 283-84, 267 Pac. 877 (1928).

Where there are two possible constructions, one of which leads to a forfeiture and the other avoids it, the courts' policy and rule of law are well settled, both in the interpretation of ordinary contracts and instruments transferring property, that the construction which avoids forfeiture must be made if it is at all possible.

Ballard v. MacCallum, 15 Cal. 2d 439, 441, 101 P.2d 692, 695 (1940);

Brant v. Bigler, 92 Cal. App. 2d 730, 208 P.2d 47, 49 (1949);

Smith v. Baker, 95 Cal. App. 2d 877, 883, 214 P.2d 94, 99 (1950).

To restate the matter, contracts and deeds are to be so construed as not to cause a forfeiture if at all possible.

Victoria Hospital Ass'n v. All Persons, 169 Cal. 455, 459, 147 Pac. 124, 126 (1915).

IV. The Findings of the Trial Court Shall Not Be Set Aside Unless Clearly Erroneous.

Rule 52 (a) of the Federal Rules of Civil Procedure prescribes that the trial court's findings of facts in actions tried without a jury, as in this case, shall not be set aside unless

clearly erroneous. *United States v. Gypsum,* 333 U.S. 364 (1948). Under the "clearly erroneous" rule, an appellate court cannot upset the trial court's factual findings unless it is left with the definite and firm conviction that mistake has been committed. *Guzman v. Pichirilo,* 369 U.S. 698 (1962).

Appellee has identified, by appropriate reference to exhibits and the reporter's transcript, the evidence introduced in this matter, which is sufficient to support the trial court's findings. In addition, appellee has referred to the applicable principles of law and equity which show the trial court's conclusions of laws based on its findings are correct.

CONCLUSION

The evidence and the applicable principles of law and equity clearly establish the property in question has not ceased to be occupied for railroad purposes and there has not been a breach of the provisions of the August 6, 1890 deed. Since appellants and their predecessors conveyed to others the land adjacent to the property in question, it is clear under applicable legal and equitable principles appellants are no longer entitled to enforce whatever rights they may have had under the provisions of the August 6, 1890 deed.

It is therefore submitted the judgment of the trial court should be affirmed.

Dated at San Francisco, California, this 27th day of September, 1963.

Randolph Karr
Roy Jerome

By Randolph Karr
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Southern Pacific Company

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RANDOLPH KARR
Attorney for Appellee.